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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| GREGG LAWRENCE KISHIDA,<br>Plaintiff and Respondent,<br>v.<br>JEAN SHIOMOTO, as Chief Deputy, etc.,<br>Defendant and Appellant. | G049242<br>(Super. Ct. No. 30-2012-00583321)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Luis A. Rodriguez, Judge. Reversed.

Kamala D. Harris, Attorney General, Alicia M. B. Fowler, Assistant Attorney General, Michael E. Whitaker and Jennie M. Kelly, Deputy Attorneys General for Defendant and Appellant.

Law Offices of Chad R. Maddox and Chad R. Maddox for Plaintiff and Respondent.

* * *

Defendant Jean Shiomoto, appearing as the Chief Deputy of the Department of Motor Vehicles (DMV), appeals from a judgment directing the DMV to set aside an order suspending plaintiff Gregg Lawrence Kishida's driver's license. The suspension was based on the DMV's finding that a test of plaintiff's blood, from a sample drawn within 90 minutes after he drove a vehicle, showed he had a blood-alcohol level of .08 percent. (Veh. Code, § 13353.2, subd. (a)(1); all further undesignated statutory references are to this code.) The trial court granted the petition finding plaintiff rebutted the three-hour presumption contained in section 23152, subdivision (b), and the DMV failed to present additional evidence supporting the suspension. We conclude the trial court erred and reverse the judgment.

## FACTS AND PROCEDURAL BACKGROUND

At 9:42 p.m., California Highway Patrol Officer C. Sanchez was patrolling an Orange County freeway when he saw a car suddenly veer onto the adjacent shoulder. Sanchez followed the car as it exited the freeway and activated his vehicle's emergency lights. The car failed to stop, turning onto a public street and continuing forward, even after Sanchez used the patrol vehicle's public address system to repeatedly order the driver to pull over. Eventually, the car parked in a handicap space.

Plaintiff was the car's driver and sole occupant. Sanchez smelled the odor of alcohol on him and noticed he had watery eyes, slurred speech, and was unsteady on his feet. Plaintiff initially denied drinking any alcohol, but eventually claimed he had consumed one medium glass of beer between 6:00 p.m. and 7:00 p.m., while eating a hamburger.

At Sanchez's request, plaintiff attempted to perform several field sobriety tests. He was successful in estimating time, but had difficulty with other tasks. Plaintiff could not smoothly track Sanchez's pen during the horizontal gaze nystagmus test,

swayed during both the Romberg and one-leg stand, missed steps when attempting to walk heel-to-toe, and failed to follow directions on how to turn around.

Plaintiff agreed to submit to a preliminary alcohol screen (PAS) breath test to determine the presence of alcohol in his system. Two breath samples were analyzed. The first at 9:58 p.m., gave a reading of .090 percent. A second two minutes later produced a result of .092 percent.

Sanchez concluded plaintiff was intoxicated and arrested him for driving while under the influence of alcohol and driving with a .08 percent or greater blood-alcohol level. (§ 23152, subds. (a) & (b).) Plaintiff agreed to submit to a chemical test of his blood and a sample was drawn at 10:58 p.m. A subsequent test of the sample produced results of .085 percent and .084 percent blood-alcohol concentration, which was recorded as .08 percent. (Cal. Code Regs., tit. 17, § 1220.4, subd. (b) ["Analytical results shall be reported to the second decimal place, deleting the digit in the third decimal place"].)

Based on the blood test, the DMV suspended plaintiff's driver's license. He requested an administrative hearing on the suspension.

At the hearing, the DMV introduced Sanchez's arrest report, the blood test results, a form Sanchez completed concerning plaintiff's license suspension (DS 367), the license suspension order, and a copy of plaintiff's driving record. Plaintiff introduced the calibration records for the intoxilyzer used to perform the PAS test on the night of his arrest.

In addition, plaintiff called Darrell O. Clardy, a forensic toxicologist. Clardy described his academic background and work experience in the field of forensic toxicology and the hearing officer accepted his status as a toxicologist.

Clardy agreed the blood test accurately determined plaintiff's blood-alcohol level at 10:58 p.m. But, based on his review of the documents admitted into evidence, Clardy asserted plaintiff was still in the process of absorbing alcohol when Sanchez

pulled him over and concluded plaintiff's blood-alcohol level at the time of driving was between .06 percent and .07 percent. He gave the following explanation for his opinion. "I'm basing it on the measured results . . . . We have the blood [test results] of . . . [.]085 and . . . [.]084 at 10:58. We have measured breath results of . . . .092 [*sic*] at 9:58 and an [.]092 at 10:00, so one hour after the PAS test, we're at a[] [.]085/[.]084. If he were post-absorptive, it would be in the area of a .074, . . . .01 lower, so its clear that [plaintiff is] absorbing alcohol at the time of the PAS test yet. And at the time the PAS test is occurring, . . . he's in the absorptive phase . . . . If we use the work published by Zuba in 2007 . . ., his blood level would be about a .075 at the time of the PAS test which places him at the time of driving in the area of . . . [.]06/[.]07, because he'd be going from a[] [.]075 up to a[] [.]085, and he'd be below an [.]07 most reasonably at the time of driving based on the measured results."

According to Clardy, the Zuba study disputed the use of the preprogrammed 1 milliliter of blood to 2100 milliliters of breath partition ratio when a person who is in the absorptive phase of alcohol ingestion is tested on an Alco-Sensor IV, the machine Sanchez used for plaintiff's PAS test. Clardy stated the study found the appropriate blood-to-breath partition ratio in this context is 1 to 1764. Using the latter ratio, Clardy claimed plaintiff's blood-alcohol level when stopped by Sanchez was no more than .075 percent.

Clardy acknowledged a person's drinking pattern can be an important factor in determining an individual's blood-alcohol level and agreed plaintiff's claim to have consumed only one medium beer two to three hours before being stopped was "inconsistent" with the test results. But Clardy asserted that since he based his opinion on "measured results over time," it was not necessary for him to consult with plaintiff or to conduct tests to determine plaintiff's rate of alcohol absorption and dissipation. Clardy also testified the peak phase of alcohol intoxication generally lasts only a few minutes.

But he acknowledged it could continue for 30 minutes under certain circumstances, including when a person has consumed food.

The hearing officer upheld the license suspension order. The officer rejected Clardy's opinions for the following reasons: "No compelling evidence was submitted to support the theory in that the Expert Witness stated the drinking pattern was not reliable . . . . The PAS logs revealed that the instrument was reading a 0.001% low compared to the target value. The argument regarding the partition ratio is irrelevant to the . . . hearing in that it is not applicable to section 23152[, subdivision] (b) . . . ."

The trial court granted plaintiff's petition to revoke the license suspension. It found Clardy's testimony rebutted the statutory three-hour presumption and the DMV failed to present qualified testimony to rebut Clardy's opinion.

## DISCUSSION

### *1. Background*

Section 13353.2 authorizes the DMV to "immediately suspend" the driving privileges of a person "driving a motor vehicle when the person had 0.08 percent or more, by weight, of alcohol in his or her blood." (§ 13353.2, subd. (a)(1).) Here, the DMV suspended plaintiff's driver's license based on the results of his blood test which indicated he had a blood-alcohol content of .08 percent when Sanchez stopped him.

However, a person who has had his or her driving privileges suspended under section 13353.2 may request a hearing to challenge the order. (§ 13558, subd. (a).) At the administrative hearing, "the DMV bears the burden of proving by a preponderance of the evidence certain facts, including that the driver was operating a vehicle with a blood-alcohol level of 0.08 percent or higher." (*Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1232.) The DMV can satisfy this burden by introducing the results of a properly conducted blood-alcohol test. (*Ibid*.) Section 23152, subdivision (b) creates

"a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood" when driving if a blood-alcohol test performed "within three hours after driving" shows the person has 0.08 percent or greater blood-alcohol level. (*Ibid*.) Section 23152 is a criminal statute, but the three-hour rebuttable presumption applies in license suspension administrative hearings. (*Borger v. Department of Motor Vehicles* (2011) 192 Cal.App.4th 1118, 1121.)

Plaintiff's .08 percent blood test result was based on a sample drawn within 90 minutes after Sanchez stopped him. Thus, DMV established a rebuttable presumption that he had a blood-alcohol level of .08 percent when driving his car. (§ 23152, subd. (b); *Shannon v. Gourley* (2002) 103 Cal.App.4th 60, 65 ["recorded test results are presumptively valid and the DMV is not required to present additional foundational evidence"].)

To rebut the presumption plaintiff had to "produce competent affirmative evidence of the nonexistence of the presumed facts sufficient to shift the burden of proof back to the DMV. [Citation.] The licensee must show, 'through cross-examination of the officer or by the introduction of affirmative evidence, that official standards were in any respect not observed . . . .'" (*Baker v. Gourley* (2000) 81 Cal.App.4th 1167, 1172-1173.) Plaintiff made no attempt to attack the validity of the blood test. In fact, Clardy conceded the blood test results were accurate.

Rather, through Clardy, plaintiff claimed he was still absorbing alcohol when stopped and his blood-alcohol concentration did not peak until at or about the time of the blood draw. The hearing officer rejected this reasoning, but plaintiff sought judicial review of the decision (§ 13559, subd. (a)), and the trial court reached the opposite result.

"In ruling on an . . . order of suspension or revocation, a trial court is required to determine, based on its independent judgment, '"whether the weight of the evidence supported the administrative decision."'" (*Lake v. Reed* (1997) 16 Cal.4th 448,

456.) But it "must accord a '"strong presumption of . . . correctness"' to administrative findings, and . . . the 'burden rests' upon the complaining party to show that the administrative '"decision is contrary to the weight of the evidence."'" (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817; *Manriquez v. Gourley*, *supra*, 105 Cal.App.4th at p. 1233.)

On appeal, we generally review the trial court's decision "'to determine whether [its] findings are supported by substantial evidence.'" (*Lake v. Reed*, *supra*, 16 Cal.4th at p. 457.) But on issues involving "statutory or regulatory interpretation, . . . we may exercise our independent judgment." (*Manriquez v. Gourley*, *supra*, 105 Cal.App.4th at p. 1233.)

*2. The Trial Court's Ruling*

In granting plaintiff's petition the trial court relied on Clardy's testimony to conclude plaintiff rebutted the three-hour presumption. The trial court erred in doing so.

As noted, the DMV established a rebuttable presumption that plaintiff's blood-alcohol level was .08 percent when driving through the introduction of his blood test results at the administrative hearing. Plaintiff conceded the accuracy of this test, arguing only that his blood-alcohol level was in fact rising when Sanchez stopped him and thus below the .08 percent limit when he was driving. The trial court cited the fact the hearing officer "accepted the qualifications of Mr. Clardy, accepted the testimony" and "[a]t no point [struck Clardy's] testimony" or "disqualif[ied]" him to conclude Clardy's "testimony on the rising [blood-]alcohol" level and "articulate[ion of] the absorption analysis in connection with the inconsistency of the two readings" was "sufficient to shift the burden" to the DMV.

There are a couple of problems with the trial court's reasoning. First, it was not necessary for the hearing officer to disqualify Clardy as an expert or strike his testimony before rejecting his opinion. Even where it is uncontradicted, an expert's

opinion can be rejected if it is based on unsound reasons. (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523.) The hearing officer explained he rejected Clardy's rising blood-alcohol opinion because it lacked supporting evidence and Clardy had relied on an irrelevant variation in blood to breath partition ratio to attack the validity of the PAS test.

Second, we agree Clardy's opinion failed to rebut the presumption because it was based on an unsupported assumption and an inadmissible fact.

Generally, in exercising its independent judgment the trial court "acts as a trier of fact; it has the power and responsibility to weigh the evidence and make its own determination about the credibility of witnesses." (*Arthur v. Department of Motor Vehicles* (2010) 184 Cal.App.4th 1199, 1205.) But while "'[a] properly qualified expert may offer an opinion relating to a subject that is beyond common experience'" (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 529), "he or she does not possess a carte blanche to express any opinion within the area of expertise" (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117). Thus, "'Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [Citations.] In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence.'" (*Borger v. Department of Motor Vehicles, supra,* 192 Cal.App.4th at p. 1122.)

To conclude plaintiff was still absorbing alcohol when Sanchez stopped him, Clardy testified he relied "on the measured results." According to Clardy, "[i]f the PAS test is accurate, then . . . making th[e] assumption that all the alcohol is absorbed . . . at the time of the blood test, [the results] should be a .075, .074, something like that." Since plaintiff's blood test showed he was only "[.]085 and [.]084, . . . he's not absorptive yet at the time of the PAS [test]. He gets post-absorptive closer to the time of the blood collection."

This reasoning is unavailing. For one thing, it is contrary to common sense to conclude a person is still in the absorptive phase of alcohol ingestion where initial tests performed within 20 minutes after being detained are nearly 0.01 percent higher than when he is tested again an hour later. (Compare *People v. Beltran* (2007) 157 Cal.App.4th 235, 246 [PAS test result of "0.08 percent" and "later intoxilyzer tests . . . of 0.10 percent" "*together* . . . show that appellant's BAC was *rising* from the time he was stopped until the intoxilyzer tests were administered"].)

Further, it is well established the rate of absorption or dissipation of alcohol can vary based on "'numerous variables such as weight, or time and content of last meal.'" (*People v. Thompson* (2006) 38 Cal.4th 811, 826; *Carleton v. Superior Court* (1985) 170 Cal.App.3d 1182, 1185.) Even Clardy acknowledged a person's drinking pattern and the consumption of food are significant factors in the absorption and dissipation of alcohol. But while agreeing the drinking pattern plaintiff reported was inconsistent with the test results, and although there was evidence plaintiff had eaten a hamburger, Clardy made no attempt to determine the time or amount of alcohol and food plaintiff consumed before Sanchez stopped him, nor did Clardy subject plaintiff to any testing to ascertain his alcohol absorption and dissipation rates under similar conditions. Clardy also admitted the length of time a person can remain at the peak level is subject to various factors, including whether the person has consumed food, but did not consider this fact in reaching his opinion.

What's more, after citing the small difference between results of the PAS test and the blood test to justify his absorptive phase opinion, Clardy then undermined that conclusion by asserting the PAS test results were inaccurate. An expert cannot assert a test result supports an opinion while simultaneously challenging the correctness of that result.

Not only that, but the basis for Clardy's claim that the PAS test results were inaccurate constituted an inadmissible opinion. In *People v. Bransford* (1994) 8

Cal.4th 885, the Supreme Court held the amendment of section 23152, subdivision (b) that declared "percent, by weight, of alcohol in a person's blood," meant either "grams of alcohol per 100 milliliters of blood *or* grams of alcohol per 210 liters of breath" (italics added) rendered expert testimony on breath to blood partition ratio variability inadmissible. "[T]he Legislature intended the statute to criminalize the act of driving either with the specified blood-alcohol level or with the specified breath-alcohol level." (*People v. Bransford, supra,* 8 Cal.4th at p. 890.)

Since *Bransford*, the case law has further limited the use of expert testimony to challenge the validity of test results obtained from approved and properly operating breath-alcohol testing equipment. In *Borger v. Department of Motor Vehicles, supra,* 192 Cal.App.4th 1118, the trial court overturned a license suspension order by relying on an expert's testimony the intoxilyzer used in that case had "an inherent margin of error of plus or minus 0.02 percent." (*Id.* at p. 1121.) The Court of Appeal reversed, finding the expert's testimony "'speculative.'" (*Id.* at p. 1122.) "There is no disagreement that the 'Intoxilyzer 5000' is an 'approved instrument' within the meaning of California Code of Regulations, title 17, section 1221.3. [The expert] did not examine the machine used . . . and he offered no opinion that the machine was not in working order. . . . In reality, [the expert's] conclusion would 'overrule' every 'Intoxilyzer 5000' reported result unless it is 0.10 percent or more. This would change the California Code of Regulations, title 17, sections 1221 through 1221.5 and effectively remove this breath testing device from the Department of Motor Vehicle's 'approved instrument' list." (*Id.* at pp. 1121-1122.)

Although decided after the trial court issued its ruling in this case, *People v. Vangelder* (2013) 58 Cal.4th 1 cited *Borger* with approval (*id.* at p. 35, fn. 28) in declaring inadmissible expert testimony that challenged the reliability of breath alcohol testing machines. At issue in *Vangelder* were two expert opinions. The first asserted that "because of saturation of breath on inhalation, [breath testing machines] sample and

measure *no* alcohol from alveolar[, i.e.], deep lung air." (*Id.* at p. 25.) The second claim was that breath testing machines were unreliable because "other physiological factors—individual breathing patterns (speed and depth of exhalation), body and breath temperature, sex, and hematocrit level (ratio of red blood cells to total blood volume)—may affect the transmission of alcohol from the bloodstream to the deep portions of the lungs and then through the upper airway and finally through the mouth." (*Id.* at pp. 35-36.) As to the former category, the court found "the fundamental reliability of the breath-testing machine models used in this case to produce results that are pertinent to the per se statute has been determined by the Legislature," and this "legislative determination is not subject to rebuttal as a defense in a criminal prosecution." (*Id.* at p. 34.) The court found the second category of expert testimony barred because "*this* aspect of the expert testimony would essentially constitute partition ratio variability evidence, which . . . is barred in . . . per se prosecutions under *Bransford* . . . . (*Id.* at p. 36.)

*Vangelder's* analysis is relevant here. The machine Sanchez used for the PAS test, an Alco-Sensor IV, is on the list of approved equipment. (Cal. Code Regs., tit. 17, § 1221.3 [approved breath testing machines include the "models of instruments . . . named in the 'Conforming Products List' published in the Federal Register by the National Highway Traffic and Safety Administration of the U.S. Department of Transportation"]; 75 Fed.Reg. 11624, 11626 (Mar. 11, 2010) [listing the mobile and nonmobile types of the Alco-Sensor IV as approved breath measurement devices].) Further, as the hearing officer noted, the calibration record for the machine Sanchez used to conduct the PAS test showed it was actually underreporting results. Finally, as the hearing officer also noted Clardy's attempt to rely on partition ratio variability to challenge the validity of PAS test results is no longer permissible.

Although we review the trial court's ruling for substantial evidence, meaning "evidence that is reasonable in nature, credible, and of solid value," and "[w]hile it is the exclusive province of the [trier of fact] to determine the credibility of a witness

and the truth or falsity of the historical facts [citation], expert . . . opinion evidence that is based upon a '"guess, surmise or conjecture, rather than relevant, probative facts, cannot constitute substantial evidence."'" (*In re Anthony C.* (2006) 138 Cal.App.4th 1493, 1504; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1110.) Clardy's explanation for his opinion that plaintiff's blood-alcohol level was under .08 percent when driving is based on surmise and conjecture alone and "and cannot be fairly characterized a 'substantial evidence.'" (*Borger v. Department of Motor Vehicles, supra*, 192 Cal.App.4th at p. 1122.) Contrary to the trial court's assumption, the hearing officer was free to reject Clardy's opinion and did not have to disqualify Clardy or strike his testimony. As a result, plaintiff failed to rebut the presumption that he had a blood-alcohol level of .08 percent when driving.

## DISPOSITION

The judgment is reversed. Appellant shall recover its costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.